



Norwegian Refugee Council

Position Paper for DC Symposium on Post-Conflict Property Restitution September 2007

Norwegian Refugee Council Presence in Afghanistan / Pakistan

NRC's Information Counselling and Legal Aid program is one of the NRC's 5 core activities.¹ The program provides information to IDPs and refugees about issues related to return to place of origin or resettlement, and legal services to assist in resolving obstacles to return or integration. The programmes are responsive and community based, using national staff to identify local needs and assist in designing program activities. ICLA Pakistan began in 2001. A sister programme ICLA Afghanistan was established in 2003. The two programmes merged to become a single regional programme in 2007.

ICLA Afghanistan has seven law offices in Afghanistan, located in Herat, Maimana, Mazar-i-Sharif, Pul-i-Khumri, Bamian, Kabul and Jalalabad. Mobile legal teams travel into additional provinces in cooperation with UNHCR and UNAMA.²

The programme employs approximately 35 practicing Afghan lawyers and provides work experience for university law students. The case load is civil cases only, and approximately 75-80% of legal cases are disputes over ownership and/or possession of land or property. In the first 6 months of 2007, ICLA teams across Afghanistan registered 412 legal cases and solved 183, benefiting approximately 140,000 individuals. Around 40% of cases are solved through the courts, but the majority is solved through jirgas, shuras and private mediation.

NRC lawyers serve as advocates and educators in both the formal and informal systems, by briefing court officials and jirga members on relevant national, international and Sharia law, and ensuring that decisions are made according to proper standards of evidence and procedure. Most significantly, in their role as external observers, NRC lawyers bring a level of accountability and transparency to both systems that may otherwise be in question.

NRC's Capacity Building Team provides training to Government of Afghanistan officials (including Ministry of Justice; Interior; Agriculture and Irrigation) and jirga/shura members on property, international and Sharia law. Trainings focus primarily on property rights and dispute resolution best practices in the Afghan context, but also include reference to relevant humanitarian principles. New trainings and training materials, both textual and audio-visual, are also developed by the CBT team based on specific training requests. CBT trainings target policy-makers,

¹ NRC Core Activities are Shelter, Distribution, ICLA, Education and Camp Management

² At the time of writing these mobile teams were operating in Ghardez, Parwan, Kapisa, Daikundi, SariPul and Kunduz.

administrative officials and community elders with decision-making power relative to property matters; trainings consistently receive positive responses from participants eager for further information.

Housing, Land, Property (HLP) issues in Afghanistan

Problems related to realization of HLP rights, such as tenure instability, secondary occupation, land grabbing and impunity, corruption in land allocation and government acquisition, are one of the greatest challenges facing returnees to Afghanistan. Many returnees are confronted with a complete lack of access to land as many were sharecroppers or other informal users before displacement. The lack of fully functional and universally available land registration, allocation and adjudication systems is a contributing factor to instability and insecurity in some areas due to land-related disputes.

Inability to access land and/or secure HLP rights is exacerbated by the lack of basic services in many parts of Afghanistan, such as potable water, shelter, adequate food, employment opportunities, education and medical services. Recognizing that tenure insecurity and more so, landlessness, are often accompanied by an absence of other basic needs, NRC's Shelter and Education programs, along with ICLA information services, seek to provide or facilitate access to fundamental needs and services.

ICLA's mandate is to assist a specific section of the population, namely returnees and IDPs. Ongoing attention to the development of functioning systems for land allocation, registration and adjudication is vital to ensure access and meaningful tenure to land for returning and host communities, thereby ensuring stability, security and durable solutions for the whole community.

A new Land Policy was released by the Government of Afghanistan in January 2007. This document was designed to establish a set of paradigms according to which laws on access, allocation, registration and resource administrative could be further developed and instituted. NRC believes that this policy document is comprehensive and in line with national and international law, and supports the development of legislation to realize the goals of Afghanistan's Land Policy. Many aspects of land administration have traditionally been managed at the community level, and continue to be in the present. NRC therefore believes that any real and lasting resolution to issues of land restitution, access and administration will require attention to existing community methods, community acceptance and enforcement.

General Observations

Based on staff and client observation and drawing from our experiences in outreach and dispute resolution, NRC considers:³

Land Allocation Scheme

Afghanistan's Land Allocation Scheme (LAS) was created by presidential decree in December 2006 specifically to assist in the resettlement of landless returnees and IDPs. The LAS requires that applicants present a valid Voluntary Repatriation Form (VRF, issued by UNHCR) or other document proving displacement and an identity card from the province of origin. Applicants can only qualify for distribution in their place of origin, and eligible applicants cannot own any other land or house. Given that one of the major obstacles facing returnees and IDPs is landlessness, NRC recognizes the great importance of this program.

To date, five pilot sites have been established in Nangarhar, Baghlan, Ghazni, Logar and Herat provinces, although land has been identified for distribution in a total of 29 provinces. Approximately, 80% of plots have been earmarked for distribution to returnees, 15% to IDPs and the remainder to especially vulnerable individuals, including widows, the elderly and the disabled.

³ We accept that our experiences of the formal and informal system are limited to the areas we work in which are relatively stable and secure. We cannot comment on whether the same approach would work in less secure areas in the east or south.

The Ministry of Refugees and Repatriation is the lead ministry responsible for the coordination of the land allocation schemes and for the selection of beneficiaries, in particular. UNHCR has supported the LAS at the Kabul and provincial levels through assistance with land identification, beneficiary selection, pilot assessments, site preparation, property titles, communication, livelihood promotion, and monitoring.

NRC recognizes that the LASs have faltered since their inception due to problems in transparency and accountability in many aspects of the program. NRC supports the ongoing cooperation of the UNHCR with MoRR, particularly relative to monitoring of beneficiary selection.

NRC also recognizes that access to land is only one component of achieving durable solutions for the displaced. The areas in which land has been identified for distribution are often somewhat isolated, and may be without access to shelter, potable water, healthcare, employment opportunities, educational facilities, and basic infrastructure. To be sustainable, land distribution must be accompanied by provision of other basic services.

It is anticipated that the numbers of returnees will sharply increase over the coming year, due to push factors from Iran and Pakistan. The LAS program must improve in its capacity and accountability if it is to effectively absorb the high numbers of returnees in the coming year.

Recommendation: That the international community continues to support UNHCR and the Government of Afghanistan to more effectively administer and monitor the Land Allocation Schemes.

Recommendation: That the international community increase funding for multi-sector projects in LAS areas, including the construction of shelter, schools, clinics, infrastructure and the creation of employment opportunities.

Recommendation: That emphasis be placed on supporting the LASs over the coming year in the face of sharp increases in returnee numbers.

The Informal System and Community Acceptance

In its current post conflict state and given the geographical and ethnic dislocations, state building in Afghanistan needs to consolidate what exists and develop it into a best practice. Problems with the rule of law, infrastructure and local capacity means that a land administration system wholly administered and enforced from the center is not likely to be viable at this point. Further, although the Pinheiro Principles suggest that compensation for occupied land should occur only when restitution is factually impossible, in the Afghan context compensation is often at the heart of restorative justice and harmonious reintegration. Compromise decisions involving compensation instead of restitution do not always achieve full realization of entitlement rights of the displaced, however, at this stage of Afghanistan's development, community practices designed for expediency and in accordance with local notions of equity should be encouraged.

Within many communities, customary practices related to land administration and adjudication are considered more equitable, accessible, cost and time effective than state mechanisms. In NRC's experience, participants in the informal process have an interest in securing more formal arrangements than those available at the community level. NRC has found that supporting the formal registration of customary documents and jirga/shura decisions is a way of tapping into existing beliefs to form links with the state.

Good models for bridging the state and the local communities exist, such as the Community Development Committees established through the NSP, designed to promulgate democracy at the village level. These efforts have been successful where community members feel that the CDCs are a resurrection of the shura/jirgas of the past rather than the implementation of a foreign concept. These models can be expanded to provide a conduit for training and mentoring in land

administration related matters. Mechanisms such as the CDCs and other customary governance bodies could also be more heavily relied upon for land administration. Local communities can be effective in long term policing and enforcement, particularly where state resources are not available. In the Afghan context, effective land allocation, registration and adjudication systems will depend on community implementation as much as state enforcement.

ICLA has found that if the informal systems are closely monitored, they can be highly successful in resolving land-related disputes, making decisions that are compatible with sharia and national law, enforcement and registration of those decisions with the formal system and administering agreements over land use. With increased training and capacity building activities, this trend could be readily encouraged and further systematized for use in a comprehensive land administration system.

Recommendation: That reform of the land allocation, administration, and adjudication sectors is evaluated on its responsiveness to Afghan needs and its recognition of existing institutions.

Recommendation: That use of the informal sector to implement land administration policy be incorporated to any comprehensive land administration system.

Dispute Resolution

Adjudication of HLP related disputes in Afghanistan is accomplished through both the formal and the informal justice systems, both of which have their strengths and weaknesses. The formal justice system is functional in most provinces and all urban centers, providing claimants with a viable forum to adjudicate their rights according to national, Sharia and international law. However, access to the formal system can be impeded by social, financial and geographical constraints, while the courts are often hindered by lack of trained officials, resources, and reference materials. Where power brokers are involved, enforcement of decisions can also be problematic. On the other hand, the informal system is widely regarded as more equitable, accessible, less expensive and time-consuming, and less susceptible to corruption. Informal dispute resolution bodies, however, do not consistently adhere to legal (national and Sharia) norms, may coerce claimants into inequitable compromise agreements, and may contribute to the continued promulgation of informal arrangements that are not in accordance with national land use policies.

In NRC's experience, effective dispute resolution can be accomplished through each system with close monitoring and often occurs through deploying components of each system. While the further development of the formal system is essential, such development should also acknowledge the vital role of the informal system in land dispute resolution. NRC believes that any comprehensive land administration policy should recognize the value of community-based dispute resolution methods, and support those methods through training on relevant national, Sharia and international law and provision of reference materials.

Issues related to dispute resolution must be also be considered in light of general rule of law challenges affecting Afghanistan.

- **Independent lawyers as an accountability mechanism**

In NRC's experience dispute resolution in the formal and informal systems is greatly improved when independent lawyers are present to act as external interveners and bring a degree of transparency and accountability to proceedings. NRC's independent lawyers can minimise delays in courts, assess standards of case management and judicial decision making, provide legal advice to members of jirgas and shuras to ensure the decision making regarding HLP rights is compatible with the law, ensure the client's case is heard and can act as an accountability mechanism through which corruption is reduced

or challenged. Whilst not their primary function, the contribution that NRC's independent lawyers make to the improvement of the transparency and accountability of both systems should not be underestimated.

Recommendation: That the role of independent lawyers and other independent observers is recognised within any strategy for the further development of land allocation, administration and adjudication systems.

- Capacity Building for Judicial, Administrative Branches
Following decades of conflict, Afghanistan's judicial and administrative departments are staffed by under-qualified officials who lack knowledge on relevant law and policy as well as access to necessary texts and material resources. To effectively implement Afghanistan's new land policy, these officials must increase their knowledge of the legal framework, national, Sharia and international, as well as to identify each department's role within the system and how they might improve cross-departmental coordination.

NRC has conducted trainings in property law in over 14 provinces in Afghanistan, targeting judges, public officials and jirga and shura members who have the most influence over resolution of land and property related disputes. Training in property law and application of the law has created a sense of ownership and acceptance among practitioners in both sectors, as well as a tendency of increased communication between formal departments, the formal and informal, and with the international community.

Recommendation: That increased efforts be made to train judicial and administrative officials in national, Sharia and international land law and policy.

Recommendation: That such training is extended to community members involved in the informal justice system.

- Specialist Tribunals
There have been several versions of specialist courts set up to deal with property law disputes since 2001.

There are occasions where specialists tribunals may be appropriate, for example if international jurisdiction applies or if a transitional justice model is accepted in Afghanistan. However, generally, ICLA opposes the creation and maintenance of specialist civil courts.⁴ ICLA experience suggests that specialist courts:

- facilitate poor management, as there is often a lack of oversight;
- consolidate bad practices or corruption where experts in the field retain a monopoly of expertise or influence;
- do not support capacity building of the legal system as a whole;
- are by nature limited and located in few places thereby excluding the majority of the population too poor or otherwise unable to travel.

Recommendation: That mainstreaming of jurisdiction be considered in the development of land policy legislation.

- Support to the Provinces
Whilst developing key areas within Afghanistan creates centres of excellence and sets standards to aspire to, it does not meet urgent needs in many outlying districts. Resources must also be invested outside urban centres to improve skills and practice

⁴ There are arguments for specialist family courts but as we have limited experience in this area we make no comments on this.

where they remain at their weakest. Uneven distribution of attention tends to result in resentment and hostility, which is not conducive to the spread of comprehensive policies and practices on the allocation, administration or adjudication of housing, land or property related issues.

Recommendation: That it be recognised in any land administration system that a geographical and needs based distribution of support will assist with the acceptance and enforcement of such a system.

CONTACTS

For further information see NRC website:

<http://www.nrc.no/>

ICLA Program Manager

ICLA.PMAf@nrcafpk.org

NRC Delegates at DC Land Restitution Conference

Rebecca Gang, Project Co-ordinator Pul-i-Khumri and AREU consultant

ICLA.PCAf3@nrcafpk.org

Paul Nesse, Internal Displacement Monitoring Centre, Resident Representative

PaulN@nrc.ch

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